not be assumed that it did not. If there was a foreman in charge of the gang, it puts the respondent out of court. If there was no foreman, it certainly does not establish the respondent's case. There is no need to recite the note of what counsel said because, rightly, it has never been argued on behalf of the respondent that the facts referred to in it could possibly discharge the burden of proof which admittedly rests upon the respondent. This no doubt is why, in the courts below, and therefore necessarily before this Board, the respondent has relied solely upon By-Law 26.

Their Lordships have dealt with the principles and the authorities relating to this branch of the law because they do, in their Lordships' view, throw considerable light on the true construction of By-Law 26.

The By-Law 26 which dates from December 5, 1913 reads as follows:

"The serangs and labourers employed in discharging and loading vessels shall be under the superintendence of the ship's officers; the Board undertake no responsibility as stevedores."

Their Lordships consider that this By-Law falls far short of putting the servants of the respondent under the entire and absolute control of the ship. It does not seem to their Lordships in the least inconsistent with their being the servants of the respondent, and not the servants of the shipowners. It throws no light upon the extent of the superintendence of the ship's officers. Superintendence is a somewhat loose and ambiguous word. For example a building owner's architect superintends on behalf of the building owner the work of the building contractor's workmen, but this does not make them the building owner's servants. The ship's officers no doubt have the right to superintend the loading by directing into which holds the cargo is to be loaded and the order in which it is to be loaded but this in no way puts the servants of the respondent so completely and entirely under the control and at the disposition of the ship's officers as to make them the servants of the shipowners, who neither pay them, nor select them, nor could discharge them. Incidentally it does not seem feasible that the ship's officers would be watching the signalmen to see that they did not give the signal to hoist when it was unsafe to give it nor the winchmen to see that they did not begin to hoist until they had received the signal to do so.

Had it been the intention of By-Law 26 to shift the *prima facie* responsibility of the respondent for the negligence of servants engaged and paid by them on to the shoulders of the shipowners, nothing would have been easier than to do so in plain words. This indeed was done in section 97B of the Port of Singapore Authority Act as amended in 1971 — which is strikingly different from By-Law 26. That section reads as follows:

"Any stevedore or workman whilst engaged in performing work in or in respect of any vessel shall, notwithstanding that his wage or remuneration for performing the said work is paid by the Authority, be deemed to be the servant of the owner and master of such vessel and the Authority shall be exempt from all liability for any loss or damage caused by any act, omission or default of such stevedore or workman."

Their Lordships do not consider that By-Law 26 is of any assistance to the respondent which is being sued in its capacity as an employer. The action is brought by the representative of one of its deceased servants in respect of the negligence of the deceased's fellow servants for which the respondent is vicariously liable. Its liability for the negligence of its servants does not spring from any undertaking it has given. It is imposed upon the respondent by the common law. In their Lordships' view, By-Law 26 does not exclude that liability, nor transfer any part of it on to the shoulders of the shipowners.

In 1913 the doctrine of Common Employment still prevailed: and that no doubt would have constituted a complete defence to the appellant's claim. That doctrine however has long since disappeared. The respondent is vicariously liable for the negligence of its servants if such negligence causes personal injury to a fellow servant or to a member of the public. In their Lordships' view the fact that the negligence occurred in the course of a stevedoring operation does not afford the respondent any defence.

Having regard to their Lordships' views about By-Law 26 it is unnecessary to deal with the argument that that By-Law was *ultra vires* or unreasonable.

Their Lordships will therefore allow the appeal and direct that judgment be entered for the appellant for $60,000 with costs here and below.

Appeal allowed.

Solicitors: *Le Brassuer & Oakley; Coward Chance.*

MOHAMED KUNJO v. PUBLIC PROSECUTOR

[P.C. (Lord Elwynn-Jones L.C., Lord Morris of Borth-y-Gest, Lord Diplock, Lord Fraser of Tullybelton and Lord Scarman) October 11 and 12, November 15, 1977]

[Privy Council Appeal No. 35 of 1976]

Criminal Law and Procedure — Appeal to Privy Council — Principles on which Board acts — Murder — Defence of sudden fight — Defence not relied upon at trial or in Court of Criminal Appeal — Whether can be raised on appeal to Privy Council — Burden on accused — Undue advantage taken by accused — Penal Code s. 300, Exception 4.

Penal Code, s. 300, Exception 4 — Burden on accused — Undue advantage taken by accused — Evidence Act (Cap. 5), s. 105.

In this case the appellant had been found guilty of murder and sentenced to death. His appeal to the Court of Criminal Appeal was dismissed and he appealed to the Judicial Committee of the Privy Council. Three questions were canvassed before the Privy Council (1) the cause of death (2) whether the appellant was so intoxicated as to be incapable of forming the intent necessary to constitute the offence of murder and (3) the defence of sudden fight, which if proved by an accused reduces the offence to one of culpable homicide not amounting to murder.

Held, dismissing the appeal: (1) it is not the function of the Board to review findings of fact or to test or weigh evidence. If there was evidence, as in this case there plainly was, upon which the court of trial could find as it did, the Judicial Committee will not interfere;

(2) the trial judges in this case had no doubts that the appellant was capable of forming and did form the intent necessary for murder and this finding had been upheld by the Court of Criminal Appeal. The Board would intervene only if it could be demonstrated that there was no evidence upon

which a fair-minded tribunal could have reached the finding and this was not the case here;

(3) a defence based upon an exception which the defendant has to prove may be raised for the first time before the Board if the Board considers that otherwise there would be risk of failure of justice. The test must be whether there is sufficient evidence upon which a reasonable tribunal could find the defence made out. If there be such evidence, the court of trial should have expressly dealt with it in its judgment and the Judicial Committee will deal with it on appeal, even though it has not been raised below;

(4) in the face of the evidence in this case, the appellant could not show that he had not taken undue advantage or acted in a cruel or unusual manner and therefore there was no need for the trial judges to refer to the defence of sudden fight in their judgment.

Cases referred to:-

(1) *Kwaku Mensah* v. *The King* [1946] A.C. 83, 94.
(2) *Budhwa* v. *The State of Madhya Pradesh* A.I.R. 1954 S.C. 652.
(3) *Kirpal Singh* v. *The State* A.I.R. 1951 Punjab 137.
(4) *Sarjug Prasad* v. *The State* A.I.R. 1959 Patna 66.

PRIVY COUNCIL APPEAL FROM SINGAPORE.

Mervyn Heald Q.C. (*George Newman* with him) for the appellant.

Christopher French Q.C. (*Stuart McKinnon* with him) for the respondent.

Lord Scarman (delivering the judgment of the Board): On February 11, 1976 the appellant was found guilty by the High Court of murder, and sentenced to death. Murder being an offence punishable by death, he was tried by a court consisting of two judges, whose decision had to be unanimous for him to be convicted of the offence: Criminal Procedure Code, section 185(1) and (2). The trial, which extended over 12 days, was notable for a painstaking and meticulous examination by the two judges of the evidence of eye-witnesses and doctors. The appellant appealed against his conviction to the Court of Criminal Appeal. The appeal was dismissed on August 12, 1976. Now, by special leave granted on December 9, 1976, he appeals against conviction to the Judicial Committee of the Privy Council.

Three questions have been canvassed before this Board:

(1) the cause of death,
(2) whether the appellant was so intoxicated as to be incapable of forming the intent necessary to constitute the offence of murder,
(3) the defence of "sudden fight" which, if proved by an accused, reduces the offence to one of culpable homicide: Exception 4 to section 300 of the Penal Code, and section 105 of the Evidence Act.

At the time of his death the deceased was 54 years of age and was employed as a lorry driver. The appellant was also 54 years of age and was employed as a lorry attendant by the same firm. The two men were friends. Both of them lived at No. 8 Pulau Saigon Road, where they had separate rooms in a store belonging to their employer. The store was adjacent to a yard, which was used for a variety of industrial purposes including the loading, unloading, and parking of lorries.

On May 25, 1975, a Sunday, their employer's manager, Tan Chwee Siong, who gave evidence, went to the store at about 7.40 p.m. to ask the two men to load and deliver some timber that night. As soon as he approached them, he realised they were highly intoxicated. He, therefore, made no request of them but told them to go and sleep. He went to this office where shortly before 8 p.m. they asked if they could do the job the following morning. He agreed, and left. He said they were, when he saw them in his office, unsteady on their feet.

There then occurred the incident in which the deceased lost his life. The trial judges, faced with conflicting evidence of two eye-witnesses, Phasaram Misa, an office boy aged 16, and Saeroen bin Rakiman, an old man (76 years old), accepted the evidence of Misa in preference to that of Saeroen whom they found to be an unreliable witness. Misa first saw the appellant and deceased sitting on a stack of poles. The two men were talking loudly and laughing. They got down from the stack and then began to argue. The argument degenerated into wrestling. As they grappled with each other, they fell down, got up, and fell down again. This happened several times. They punched each other, as they fought. Suddenly the appellant ran toward the store of No. 8 Pulau Saigon Road, where a lorry was parked, and returned with the exhaust pipe of a motor vehicle. He then rushed at the deceased, who was standing up, and delivered one blow on his head with the exhaust pipe. The deceased tried to defend himself with his hands, but almost at once fell to the ground. The appellant then hit at his head three or four times with the exhaust pipe. He then threw the exhaust pipe on the ground, and walked away. The deceased was lying in a pool of blood. When the ambulance arrived at 9 p.m., the deceased was found to be dead.

The appellant was medically examined at the Changi Prison Hospital at about 2.30 a.m. The doctor noted that his breath smelt of alcohol, that his gait was staggering, and that he had a sub-conjunctival haemorrhage in the right eye and that he had an abrasion of some 5 inches over the back of the right forearm. When his blood was analysed, it was found to contain 100 mg. of alcohol per 100 ml. of blood. An autopsy of the deceased revealed the following fractures:

(1) comminuted fractures in the region of the left forehead,
(2) comminuted fractures involving both temporal bones (i.e. behind each ear),
(3) a fracture line across the base of the skull.

Dr. Seah, who conducted the autopsy, also gave evidence and was subjected to a prolonged cross-examination by defence counsel, in the course of which he conceded that there was a number of possibilities as to the cause of death including that of a fall. He concluded that the fractures to the left forehead occurred after death because they were not associated with any haemorrhage, and gave as his opinion that most probably the deceased died of a fractured skull resulting from two blows with a blunt instrument behind the ears.

The appellant did not give evidence, but made an unsworn statement from the dock. In a short statement made by him under caution, and given in evidence, he said:

"The fight started because I told Arunmugam not to drink when he drove lorries. He got angry and punched me on the eye. He also used a wood to hit me on my left hand. I got angry and hit him back. I do not remember with what I hit him. I had no intention to kill him. I did not know he will die. That's all."

The trial judges found that the deceased was standing up when the appellant delivered the first blow, that the cause of death was a fractured skull, and that the appellant inflicted the fatal blows. In their grounds of decision they dealt at length with what they said was "the main question" for their consideration, namely the appellant's intention, and stated their conclusion in these terms:

"After considering all the evidence... we were of the view that the action of the accused could not possibly be the action of a person who was so severely intoxicated that he could not form the intention to inflict the fatal blows."

The evidence, they said, clearly showed that he intended to cause the injuries which resulted in death.

On appeal, the Court of Criminal Appeal reviewed the evidence and concluded that there were no grounds at all for disturbing the conviction of murder.

Mr. Heald Q.C., for the appellant has sought to attack the judges' finding as to cause of death on the ground that there is an inconsistency between the opinion of Dr. Seah and the evidence of Misa. The doctor said the fracture of the left forehead was a post-mortem injury: the boy said the first blow, which was struck while the deceased was still standing, was a blow to the left forehead. Mr. Heald submitted that the boy's evidence can only be accepted, if the doctor's opinion be rejected. So grave an inconsistency throws substantial doubt, it is said, upon the prosecution case. The trial judges were careful to make no finding as to the precise region of the head where the first blow landed. They were, however, satisfied that the deceased was standing up when first struck on the head and asserted that "there was no doubt" that it was the accused who inflicted the fatal blows. Misa may, or may not, have accurately observed where the first blow landed. Whether he did or not, the totality of the evidence was such that the judges were well justified in reaching the conclusion that they did. Mr. Heald also suggested that, since the doctor accepted under cross-examination that death could have been caused by any one of four possible causes, the trial judges must have departed from the standard of proof required in a criminal trial when they found as a fact that death was caused by a blow. The doctor's opinion, however, remained that death was most probably caused by a blow, or blows, and upon the totality of the evidence the judges' finding was well justified.

We have expressed an opinion upon these submissions because, having heard them developed in argument, we have thought it helpful to make plain our opinion that the trial judges' findings were soundly based. But it is not the function of this Board to review findings of fact. The principles of our jurisdiction are well known. It is not for us to test or weigh evidence. If there be, as in this case there plainly was, evidence upon which the court of trial could find as it did, the Judicial Committee does not interfere.

These observations apply equally to the question of the appellant's intent. Mr. Heald's submission that the evidence does not warrant the finding that the appellant was capable of forming and did form the intent necessary for murder is misconceived. The trial judges had no doubts at all. Their finding has been reviewed and upheld by the Court of Criminal Appeal. The Board would intervene only if it could be demonstrated that there was no evidence upon which a fair-minded tribunal could have reached the finding: and that is not this case.

The third question, however, does present some difficulty. The Penal Code is largely derived from, and very close in many of its provisions to, the Indian Penal Code. The provisions we have to consider are also to be found in the Indian Code. Culpable homicide is defined by section 299 of the Penal Code. Section 300 specifies the four cases in which culpable homicide is murder. The section, so far as relevant to the present case, provides:

"300. Except in the cases hereinafter excepted culpable homicide is murder —

....

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death;

...."

Exception 4 provides:

"Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner."

The burden of proving the exception rests upon the defendant: section 105 of the Evidence Act.

The exception was not relied upon by the defence either at trial or before the Court of Criminal Appeal. It is not mentioned in the judgments of the High Court or the Court of Criminal Appeal. Can it now be raised for the first time?

Where trial has been by jury and the burden of proof is upon the prosecution to negative the defence, it is settled law that the judge must put to the jury all matters which upon the evidence could entitle the jury to return a lesser verdict than murder. And, if the judge fails to do so, the Board will intervene, even if the matter was not raised below. For otherwise there would be the risk of a failure of justice. In *Kwaku Mensah* v. *The King*,[1] Lord Goddard, giving the reasons of the Board for allowing the appeal, said, page 94:

"The principles on which this Board acts in criminal cases are well known and need no repetition, but when there has been an omission to place before the jury for their consideration a matter of such grave importance that they were never led to consider whether in this respect the prosecution had discharged the onus which lay on them of proving murder as distinct from manslaughter, their Lordships think that they can properly entertain the appeal. They would add that it must be seldom that they consider a matter which was not only not mentioned in the courts below, but was not included in the reasons given by the appellant in his case."

Although different considerations arise where, as here, the burden of proving the defence or exception is upon the defendant and trial is by judge (or judges) alone, Mr. French for the Public Prosecutor has not contended either that section 105 of the Evidence Act, or the mere fact of trial being by judge alone, precludes the Board from considering a defence not raised below. But he does raise the point that it does not follow from a judge's silence as to a possible defence that he has ignored it. He may have thought the matter too plain for argument — more especially, if it has not been raised by the defence. Moreover it would not, in our judgment, assist the administration of criminal justice if there were to be cast upon the High Court the duty of reciting in judgment only to reject every defence that might have been raised but was not. Nevertheless there will be cases in which justice requires the Board to consider matters not mentioned in the court below. It is to be noted that in India, where there is also no trial by jury and the burden of proving the exception of "sudden fight" is upon the defendant, the Supreme Court of India has considered and given effect to the exception, substituting a verdict of culpable homicide for one of murder, although the exception had not been relied on at trial: see *Budhwa* v. *The State of Madhya Pradesh*.[2] In our judgment a defence based upon an exception which the defendant has to prove may be raised for the first time before the Board, if the Board considers that otherwise there would be a real risk of failure of justice. The test must be whether there is sufficient evidence upon which a reasonable tribunal could find the defence made out. If there be such evidence, the court of trial should have expressly dealt with it in its judgment and the Judicial Committee will deal with it on appeal, even though it has not been raised below.

We turn now to the question whether in the present case the evidence was such that the High Court could have reasonably concluded that the defence of sudden fight was made out. There was evidence that the act causing death was done without premeditation. In *Kirpal Singh* v. *The State*,[3] a case in which the exception (no. 4 to section 300 of the Indian Penal Code) was raised unsuccessfully, Bhandari J. said (paragraph 14 of his judgment) that "to constitute a premeditated killing it is necessary that the accused should have reflected with a view to determine whether he would kill or not": in other words, there must be an element of design or prior planning. In the present case there was evidence that suggested strongly the absence of any element of design or planning. There was also evidence that the blow, or blows, were struck "in a sudden fight in the heat of passion upon a sudden quarrel", though there was also evidence (i.e. going in search of the weapon, returning with it, and striking the deceased when he appeared to be neither aggressive nor on his guard) which suggested the contrary. But formidable difficulties face the appellant when he attempts to show that the act causing death was committed "without the offender having taken undue advantage or acted in a cruel or unusual manner". The appellant, who had been engaged in a fight with the deceased, ran to get a weapon and returned to attack the defenceless deceased with a truly murderous weapon, the exhaust pipe, a photograph of which we have seen. The evidence of the assault shows that the deceased was taken by surprise and attacked with a very unusual and unexpected weapon, a heavy blow on the head from which could reasonably be expected to be lethal. In one of the Indian cases to which we were most helpfully referred, *Sarjug Prasad* v. *The State*,[4] K. Sahai J. commented that "undue advantage ... means unfair advantage." In the face of the evidence, we do not see how the appellant could prove that he had not taken undue advantage or acted in a cruel or unusual manner.

There was, therefore, no need for the trial judges to refer to the exception in judgment. Indeed, had the trial been a jury trial, we doubt whether the judge would have considered it necessary to put the defence to the jury. In our judgment, therefore, the appellant's argument based on the exception of "sudden fight" fails.

It follows that the appeal must be dismissed. We would, however, respectfully wish to draw the attention of those whose duty it is to advise the President on the death sentence that the offence was committed over 2 years ago, and that there are mitigating factors worthy, it may be thought, of consideration before a decision is taken in regard to the sentence.

Appeal dismissed.

Solicitors: *Coward Chance; Charles Russell & Co.*